STATE BOARD OF EQUALIZATION

April 4, 1975

Mr. T--- -. O---
Attorney at Law
Suite XXXX
XXX South --- Street
--- ---, CA XXXXX

Dear Mr. O---:

RE: A--- - P--- of California
SC – XX-XXXXXX

Your file No. 104.1-1

Upon your request for a reconsideration of your client's claim, the matter was referred to me for that review.

From the correspondence it seems to me there are two prime points of actual disagreement.

The first is our conclusion that when Section 6016.5 states that the telephone line and the poles, towers, or conduit by which it is supported or contained are not tangible personal property, the section does not decree that the line components are not tangible personal property before they are made into the completed line. Only the constructed telephone line is not tangible personal property. In other words, the components do not constitute a telephone line at the time of their sale to the construction contractor.

The second is our conclusion that the cables and related items are materials rather than fixtures for the purposes of Regulation 1521. They are not accessories to the telephone line. Even King states that a powerline (and presumably a telephone line) is to be categorized as a "structure on land" (22 Cal. App. 3d 1006, 1014).

The other differences may be more apparent than substantive.

The accepted facts seem to be that (assuming for description our view of the two prime points above) your client sold tangible personal property to M--- Contracting Co., which used the property so purchased as constituents of a telephone line it was constructing pursuant to a contract M--- had with the V--- Telephone Company. The question is whether the sale of the tangible personal property by A--- - P--- to M--- was or was not a sale at retail (for the purposed of the sales tax) or was used or consumed by M--- (for the purposes of the use tax).

For the purposes of the dollar responsibility of your client, we do not tend to distinguish carefully between the sales tax imposed on your client and the use tax imposed upon M--- which your client has the responsibility of collecting and paying. I assume without investigation that the use tax is the applicable tax because your client is located out of state. Therefore, in all probability, the sale of goods shipped to M--- in California is not subject to sales tax because of Section 6352 and the prohibitions imposed by the due process and interstate commerce provisions of Amend. XIV and Art. I, §8 of the U.S. Constitution. In other words, either title passed outside this state or the sale was a sale "in" interstate commerce. But we see no inhibition to the application of the sales tax in the issues raised by this petition.

The basis for our belief that the sale was at retail is a consequence of the interaction of Sections 6007 and 6016.5. Section 6007 provides:

> "A 'retail sale' or 'sale at retail' means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property."

If the section read as quoted in your letter of January 16, "other than resale in the regular course of business in the form of tangible personal property", you would have presented a different argument. But that section requires that the resale be in the form of tangible <u>personal</u> property and the construction of the telephone line by M--- prevents them from transferring or selling it as tangible personal property. Since the sale to M--- was at retail, the gross receipts must be included in the measure of sales tax unless an independent reason prevents that tax from applying. Please understand that we do not argue that V--- did not become the owner of the completed telephone line.

If the sales tax is not applicable for any reason, it appears to us that M--- necessarily stored and used the components and is subject to use tax. As well as the actual dominion exercised by the contractor in devoting the purchased tangible personal property to the construction contract, M--- also, by those acts (and the effect of Section 6016.5), changed the nature of the items from tangible personal property. That to us is a Section 6009 use taxable under Section 6201, since use, as defined, is not confined to consumptive actions. Although Section 6009 excludes the sale of that property in the regular course of business, that property referred to must be tangible personal property. While that portion of that section is not as literally specific as the first sentence of Section 6007, we believe the conclusion inescapable because the Sales and Use Tax Law is intended to be complementary and must be so interpreted.

Although we believe the point is not relevant, we note that under these circumstances V--- cannot be a taxable consumer for the purposes of the Sales and Use Tax Law because it did not purchase tangible personal property from a retailer upon which it can be taxed.

One point of clarification. The resale certificate referred to in earlier correspondence is the certificate prescribed by Regulation 1668. M--- did not issue such a certificate to your client, nor should it have. Perhaps M--- does hold a seller's permit (Section 6067). California businessmen often refer to their seller's permit as a "resale card". For our purposes, it does not matter whether or not M--- had a seller's permit.

You are correct that Regulation 1521(g) only states that certain persons are construction contractors. But in denying that the materials your client sold to M--- became fixtures, we must rule that M--- was the consumer of them as a construction contractor. So the application of tax to the consumption of materials is expressed in (b) rather then (g).

I must submit a recommendation that the claim be denied.

If you have any questions about the administrative process in handling the claim, please do not hesitate to contact me directly at the above address.

Very truly yours,

Philip R. Dougherty
Tax Counsel